

## **EQC/LJIAC EMINENT DOMAIN SUBCOMMITTEE**

March 23, 2000

Final Minutes

### **SUBCOMMITTEE MEMBERS PRESENT**

Sen. Mack Cole, Chair  
Rep. Kim Gillan  
Rep. Gail Gutsche  
Rep. Monica Lindeen  
Rep. Dan McGee  
Rep. Jim Shockley

Sen. Spook Stang  
Rep. Bill Tash  
Mr. Tom Ebzery  
Ms. Julia Page  
Mr. Jerry Sorensen  
Ms. Julie Lapeyre

### **STAFF MEMBERS PRESENT**

Krista Lee, EQC  
Gordy Higgins, LJIAC  
Greg Petesch, LSD  
Judy Keintz, Secretary

### **VISITORS' LIST**

**Attachment #1**

### **SUBCOMMITTEE ACTION**

- Approved minutes of the January 20, 2000, Eminent Domain Subcommittee Meeting.
- Approved that a draft handbook be prepared and following the 2001 Legislative Session a final version be printed. Any changes made during the session would be incorporated.
- Reviewed and discussed Issues Progress Matrix. Made findings and recommendations regarding work plan tasks.
- Set the next meeting date for April 12<sup>th</sup> in Helena.

### **I CALL TO ORDER AND ROLL CALL**

CHAIRMAN COLE called the meeting to order at 11:00 a.m. Roll call was noted; all members were present (**Attachment #2.**)

#### **► Adoption of Minutes**

**Motion/Vote: MR. SORENSEN MOVED THAT THE MINUTES OF THE JANUARY 20, 2000, EMINENT DOMAIN SUBCOMMITTEE MEETING BE APPROVED AS WRITTEN. THE MOTION CARRIED UNANIMOUSLY.**

## II ADMINISTRATIVE ITEMS

### ▸ MetNet Review

MS. LEE noted that the MetNet set up is very prompt in regard to the beginning and ending of the session. The two sites for this evening's public hearing are Glasgow and Miles City.

### ▸ Draft Recommendation - "Clean Up" Bill

MS. LEE provided a copy of the draft recommendations related to a "clean up" bill. She requested that the subcommittee review the draft bill for discussion at a later time. (**Exhibit 1**).

## III DRAFT HANDBOOK CONTENTS

MS. LEE provided a copy of the draft handbook, **Exhibit 2**. The handbook content is completed except for the conclusion. The draft clean up bill language was used for the handbook. Special care was taken to make sure that the content is easy to understand and that the meaning has not been changed. Throughout the eminent domain code there are references to the underground gas reservoirs. She questioned whether this information should be included in the handbook or whether a reference would be sufficient. The subcommittee felt that a reference would be sufficient.

There is a potential for eminent domain legislation next session. She questioned whether the handbook should be in draft form for use during the session with a final copy prepared following the session.

MR. EBZERY noted that there is no guarantee of the content of the clean up bill following the legislative session. It would be an assumption to use this language in the handbook.

**Greg Petesch, Legislative Services Division**, remarked that for the handbook to be of use to the general public it would be necessary to interpret current statutes. The clean up bill and the handbook use plain language. He noted that the public uses section is especially confusing. However, the handbook, as written, does a good job in explaining the process.

REP. TASH noted that the disclaimer states that the handbook is a guide to eminent domain statutes in Montana and should not be used as a legal reference.

REP. MCGEE remarked that it would be premature to write the final draft of the handbook prior to the next legislative session.

**Motion: REP. LINDEEN MOVED THAT A DRAFT HANDBOOK BE PREPARED AND THAT FOLLOWING THE 2001 LEGISLATIVE SESSION A FINAL VERSION BE PRINTED. ANY CHANGES MADE DURING THE SESSION WOULD BE INCORPORATED.**

MS. LEE questioned whether further information would be needed for the draft handbook. The Subcommittee requested more time to review the handbook. A disclaimer would be necessary.

**Vote: THE MOTION CARRIED.**

MS. LEE summarized that following the receipt of comments from the Subcommittee members, she would incorporate the changes and have the draft handbook available for approval at the next meeting. She further questioned whether a glossary should be included in the handbook. The Subcommittee discussed using a source reference but noted that this may make the handbook more complicated. As the members review the handbook, suggested changes will be noted.

MS. LEE added that the “information resources” section could contain a list of the location of additional information on eminent domain.

#### **IV INDUSTRY INSIGHT INTO THE USE OF EMINENT DOMAIN**

##### **► Express Pipeline Company**

**Ms. Florence Murphy, Express Pipeline Company**, provided her written statement commenting specifically about the Express Pipeline experience in Montana, **Exhibit 3**.

##### **► Montana Electric Cooperatives’ Association**

**Mr. Gary Wiens, Montana Electric Cooperatives’ Association**, remarked that there are 26 electric cooperatives in Montana serving 185,000 customers. He presented a written statement, **Exhibit 4**.

##### **► U S West**

**Barbara Ranf, U S West**, presented a written statement, **Exhibit 5**. She noted that in the past 20 years, they have used condemnation proceedings twice.

##### **► Montana Telecommunications Association (MTA)**

**Geoff Feiss, General Manager, MTA**, presented his written statement, **Exhibit 6**. He noted that state and local governments are beginning to view access to public lands as a source of revenue and/or “barter” currency for free services.

### **Questions from the Subcommittee**

MR. EBZERY remarked that there have been allegations that on a particular pipeline project there were several uses associated with the easement. He questioned the uses associated with the Express Pipelines easement. **Ms. Murphy** explained that this is usually covered during the time of negotiations with the landowner. Typically the easement states that the right-of-way will contain fiber optic or other necessary telecommunications to operate the pipeline. The easement specially states that the use is for the pipeline.

MS. PAGE asked for more information in regard to the court case where necessity was denied. **Ms. Murphy** remarked that the judge reviewed public necessity and held that for Express Pipeline's argument, they had not pleaded necessity. Express Pipeline's view was that necessity had been proven by the fact that they had been granted a permit. Following the court proceeding, this issue was renegotiated with the landowner.

MS. PAGE asked whether the companies received requests to put in different types of uses in their easements. She further questioned whether they would see that as an appropriate use of the easement that they had negotiated with the landowner. **Ms. Ranf** explained that even though they have an easement, the interested party would need to negotiate with the landowner. They are not in a position to negotiate. **Mr. Feiss** remarked that this would be the same for the companies he represents. They are able to reenter, but if any land is disturbed it is put back to its original condition. They do not share easements with others. **Ms. Murphy** also remarked that their easement is with the landowner for the pipeline only.

MR. EBZERY believed there would be some concern about coordination if the landowner negotiated the use of the easement with another company. **Ms. Murphy** maintained that coordination would be essential. They would need to work very closely to make sure that what went into the right-of-way would not affect their operation. **Mr. Wiens** remarked that they would also make sure that any new changes were negotiated with the landowner.

REP. GILLAN questioned whether deregulation would have any impact on the definition of "public use". **Ms. Ranf** stated that part of the confusion is with telecommunications because all the different technologies and companies are converging. Currently there are electric companies offering telephone services, internet services, and cable TV. The industry is changing its look. The federal law opened up the local telecommunications network by stating that all telecommunications companies had to be treated on a non-discriminatory basis. A barrier cannot be created that would impede competition.

REP. GILLAN stated that the original premises of utility companies were based on public good because there was only one provider in an area. **Mr. Feiss** noted that there are a number of new companies offering telecommunication services. Do they all have the power of eminent domain? He believed they could under current law. The federal law also protects these companies.

MR. EBZERY asked the panel members their stance on the current eminent domain statute.

**Ms. Ranf** stated the current statute is working for US West. If there are any changes, it is important that those changes do not harm their ability to do business. **Mr. Wiens** agreed that the current eminent domain statutes work very well. They only require easements and do not require title. **Ms. Murphy** concurred that current law works very well for both parties.

## **V      MATRIX UPDATE**

MS. LEE provided a draft copy of the Issues Progress Chart, **Exhibit 7**.

### **►      Entities Authorized to Exercise Right of Eminent Domain**

The Subcommittee noted it might be better to work with public uses instead of entities under this work plan task. **Mr. Petesch** noted that, depending on the use, there are instances where only a governmental entity may condemn. This would include streets, cemeteries, etc.

### **►      Federal/State Relationship**

MS. LEE noted that there was interest in reviewing the type of interest the state would have under federal condemnation proceedings. The state has no say in federal condemnations but for a federal condemnation to occur there are numerous things that need to happen. The federal government can change public land to park land. For private property to be condemned, legislation is necessary. Also, the acquisition language much state that condemnation is one of the methods that the government can use for acquisition and funds must also be appropriated.

The Subcommittee noted that, under this category, existing law is adequate.

### **►      Reversion of Property**

MS. LEE remarked that if the interest in the property is other than fee simple, it reverts back to the original owner or successor-in-interest. If the interest in the property is a fee simple interest, it can be sold at auction and the original landowner or successor-in-interest has the right to meet the bid received at auction. With regard to a fee simple interest, the Montana Department of Transportation is not required to allow the option for the original landowner or successor-in-interest to meet the bid received at auction.

MS. PAGE stated that in regard to abandoned easements or easements not in use, it might be advantageous to have a sunset. For instance, if an easement was not used for five years, this could trigger a process whereby the landowner could petition the court for an abandonment of the easement.

**Mr. Petesch** noted that the reversion of easements was contained in § 70-30-322. Currently, the law provides that when the easement is abandoned or the purpose for which it was acquired has terminated, the property reverts to the original owner. The test for abandonment is a test by the court.

REP. SHOCKLEY believed that, without a fixed amount of time, it would be very difficult and expensive to prove abandonment. Clarification of the statutes may result in less litigation.

MR. EBZERY questioned whether other states had a fixed time set for abandonment. He wasn't aware of anyone bringing up this problem at any prior meetings. It would be very important to set out the conditions that constituted abandonment before limits were set. He requested that information be provided for this issue in regard to how other states handle the issue. He also requested to see some proposed language on this item.

► **Mitigation Measures**

MS. PAGE noted that a large amount of the public comment which the Subcommittee has received addresses mitigation issues. There is a different standard for pipelines when crossing federal or state land versus crossing private land. The private landowner does not have as much right to require mitigations. The findings should reflect this. Also, mitigation measures are alluded to in the law in that the basis for a condemnation includes the least private injury for the greatest public good. This is an important issue for the landowner.

SEN. STANG noted that the Colorado law addresses the use of bonds.

MS. LEE will review Colorado law related to bonds. This will be sent to the Subcommittee for their review. She will also request information from entities who work in Colorado regarding the use of bonds.

SEN. STANG questioned whether there was anything in the current law that would prohibit an individual from forcing a pipeline to obtain a bond.

**Mr. Petesch** remarked that a private landowner could not require the company to post a bond. It is not statutorily authorized. The only place where bonding is referred to is in reference to

building the legal fences required around railroad and highway right-of-way. This is protection for the landowner. This is the only place where bonding is provided for in the eminent domain statutes.

REP. LINDEEN remarked that the threat of eminent domain made it very difficult to negotiate in many cases. The mere fact that eminent domain can be used limits negotiations.

► **Standards and Specifications**

The Subcommittee decided that this was beyond the scope of the study and no action would be taken at this time.

► **Possession of Property**

**Mr. Petesch** stated that necessity can be appealed. Section 70-30-311 provides that the court may put the condemnor in possession of the property.

MS LEE stated that the Constitution expressly provides, once the preliminary condemnation order has been filed and the condemnor has paid the estimated amount of the value into the court, the condemnor may take possession of the property. The statutes state that possession of the property by the condemnor prior to the exhaustion of all appeals is at the discretion of the court.

SEN. STANG asked **Ms. Murphy** if Express Pipeline would take possession of the land before this had been determined in a court. **Ms. Murphy** stated they would not because it could place the rest of the project at risk.

The Subcommittee determined that a finding on this issue is that the Constitution provides that a condemnor may take possession of the property before an appeal, at the discretion of the court.

► **Liability**

The Subcommittee decided to review this item later in the meeting.

► **Use of Interest Taken**

MS. LEE provided a memo from **Mr. Petesch** regarding additional use of easement acquired through eminent domain, **Exhibit 8**.

**Mr. Petesch** stated that additional uses of an easement can be made. For example, utilities are encouraged to use highway right-of-way for certain purposes. Water and sewer lines are

encouraged to be placed under streets because additional property does not need to be taken for the additional use. A question has been raised as to whether a pipeline, that is specifically authorized to place fiber optic cable as a part of its pipeline operation, could sell part of the use of that fiber optic cable. Would the landowner be entitled to additional compensation? The conclusion is that the landowner is only entitled to additional compensation for other uses if there is an additional burden placed on the land. Since the fiber optic is in place and there is no additional burden to the land itself, the landowner would not be entitled to additional compensation unless, as part of the negotiations in acquiring the easements, the documents provided for the same.

REP. SHOCKLEY questioned whether an entity could add 20 cables to the easement. **Mr. Petesch** noted that if it was necessary to dig up the land to place the additional cable there might be additional compensation.

MS. PAGE questioned whether the law stated that when an easement was negotiated there was a need to specify it be for one use. It is one thing to put in a cable that will help control the pipeline. It is quite a different matter to place a large cable that had capacity and could be sold for telecommunication purposes. **Mr. Petesch** explained that the law did not contain express language regarding negotiating to acquire use and condemning for a use. Condemning for a pipeline is a different public use than condemning for telecommunications purposes.

REP. TASH suggested a finding that the present law is adequate.

REP. GUTSCHE suggested a draft recommendation that this matter be further explained in the handbook. The landowner needs to be aware of the uses of interest taken.

REP. SHOCKLEY questioned whether a condemnor who put in additional cables would be able to gain an easement by prescription in five years. **Mr. Petesch** replied that he would not because the landowner would not have known about the placement of the additional cables.

MR. SORENSEN stated that the language in the statute should clarify that the condemnor can only condemn for a specific use.

MR. EBZERY suggested that the language be placed in the handbook.

► **Due Process**

MR. SORENSEN noted that this has not been brought up in public comment. Due process is a constitutional requirement.



REP. TASH remarked that in regard to prescriptive easements, the due process allowed is tied to the burden of proof. A finding could state that the present law is adequate.

► **Burden of Proof**

REP. LINDEEN noted that there has been interest in changing the standards for burden of proof in regard to private entities versus public entities. It has been recommended that the burden of proof be changed to clear and convincing evidence.

**Mr. Petesch** explained that the clear and convincing evidence standard is a middle tier standard. It is greater than a preponderance but not as high as beyond a reasonable doubt.

MS. PAGE maintained that the significance of property being taken should require that the condemnor prove by clear and convincing evidence that it has met the four tests.

SEN. STANG noted that this could be stated as a draft recommendation. If industry has a concern, we will hear from them on the matter.

MS. PAGE suggested that the finding might be that the power to take private property for a use is such an awesome power that it ought to require clear and convincing evidence.

MS. LAPEYRE stated that the finding could state that the Subcommittee had a long discussion regarding whether clear and convincing evidence is an appropriate standard. The Subcommittee is considering making this a draft recommendation.

**Todd Gunderson, Attorney**, questioned why the standard for the burden of proof should be raised. It is necessary to prove that the public interest requires the taking and that it is an authorized use. It must be a necessary use.

MS. LEE summarized the findings: 1) The power to take private property for a use is such an awesome power that it ought to require clear and convincing evidence. 2) A precedent has been set for a higher level of proof through the NEPA/MEPA process. 3) Private entities, unlike public entities, are unregulated. 4) After much discussion regarding whether clear and convincing evidence is an appropriate standard, the Subcommittee is considering making this a draft recommendation.

It was suggested that the Subcommittee use one finding: The Subcommittee has discussed the issue of “clear and convincing evidence” standards. The Subcommittee needs more information on this prior to making a decision on any recommendation.

**Motion/Vote: SEN. STANG MOVED THAT THE ABOVE FINDING BE ACCEPTED BY THE SUBCOMMITTEE. THE MOTION CARRIED.**

► **Rights of Reentry**

The Subcommittee decided that the present law is adequate.

► **Type of Interest Taken**

REP. TASH stated that both options, easement and fee title, need to be available.

**Mr. Petesch** noted that the condemnor takes the least interest necessary for the purpose unless the condemnor can show that a greater taking is necessary.

MS. PAGE stated that there was a bill in the last session to have the default for interest taken be an easement instead of fee title. If a condemnor wanted a greater interest, this would need to be demonstrated.

**Mr. Petesch** added that the bill created a presumption that shifted the burden of proof.

MS. PAGE questioned whether the burden of proof was on the condemnor. **Mr. Petesch** clarified that the current burden of proof is on the condemnor to show that taking the fee title is necessary.

REP. LINDEEN recommended a finding that current law is adequate because the interest is limited to easement unless the condemnor can prove to the court that a greater interest is necessary.

► **Public Uses**

MS. PAGE noted that if the public felt they had some standing in the eyes of the court to challenge public use, this may address some of the concerns the public has brought to the Subcommittee.

REP. LINDEEN agreed that the landowner needed to be allowed some vehicle to challenge whether or not a particular project is a public use.

MS. PAGE added that there could be a distinction made between the exercise of the use of eminent domain for public purposes by a public entity versus a private entity.

MS. LEE explained that “necessity” has not been defined. If the Subcommittee wants to propose that an entity needs to meet a certain standard to be considered a public use, it is the legislature’s responsibility to determine the standard.

**Mr. Petesch** added that the first finding was that the use is a public use authorized by law. The statute is a checklist. Then it is necessary to show that the project is in the public interest and that the taking is necessary for the public use. Establishing that the project is in the public interest is different from establishing whether or not the project is a public use.

REP. SHOCKLEY stated that if he wanted to build a flume across someone’s property, because this is an enumerated use, he could go ahead with the project. **Mr. Petesch** maintained that he would have to show that it was necessary to cross the property and that it was in the public interest that the flume be built. Flumes are presumed to be in the public interest if they are serving a mine or a smelter. A ditch across someone’s land is always presumed to be in the public interest.

**Clint McRae, Rancher**, stated that the question was whether need was included in the permit. An entity should be able to receive a permit but the need should be proven separately. MR. SORENSEN requested more information regarding how the court reviews this section of the law when making its decision.

**Mr. Gunderson** remarked that the Cenex Pipeline was placed in 1954. Once it was necessary to replace, the question became whether or not it should be replaced next to the Yellowstone River. Forty miles of the pipeline was sitting in the groundwater. Was it in the public interest to move the pipeline to dry land? He believed that it was.

MR. HIGGINS added that there are many State Highway Commission cases from the 1960s and 1970s that address whether or not the public interest was being met. He offered to provide these cases for the Subcommittee. There are a variety of reasons that the courts failed to agree with the Department over the necessity and public interest issues.

REP. MCGEE asked for clarification of the discretion of the court under § 70-30-206(2). He believed this was subjective. **Mr. Petesch** remarked that absent any precedential cases, this may be the case. However, courts are limited by precedent.

SEN. STANG questioned whether there is any history where the right of eminent domain is in the permitting process. This would allow people to know up front that the project is a public need and necessity. **Mr. Petesch** remarked that he could not imagine an entity condemning land if it was necessary to obtain a permit first. If the permit was denied, the entity would have

land that it could not use. A permit may be denied even though the project is an enumerated public use.

REP. MCGEE questioned if there was a known case where an entity in a condemnation proceeding argued that the project was in the public interest because a permit had been issued. **Mr. Petesch** acknowledged that the attorneys would use a permit as evidence in a court case.

**Rep. Bob Story, HD 24**, questioned when in the process an entity should know that they have the power of eminent domain. Should the entity know up front when they are issued a permit or wait until they have signed documents with all landowners. He further remarked that the Subcommittee had commented several different times that issues could be handled by negotiation. He raised a concern about the process once negotiations broke down. Once the parties are back into court, the statute is the guideline in the court proceeding.

MS. LEE stated that the remainder of the Issues Progress Chart would be discussed at the next meeting. The Work Plan Tasks would include public uses, just compensation and necessity.

Additional meeting handouts: Draft legislation re: liability - **Exhibit 9**, March 2, 2000 memo from Mr. Petesch re: Condemnation of Private Roads - **Exhibit 10**, February 29, 2000 memo from Mr. Petesch re: Easement Update - **Exhibit 11**, Definition of common carrier - **Exhibit 12**, Comment from Sheila Vosen-Shorten - **Exhibit 13**, and Comment from Ms. Charlotte Easter Kress - **Exhibit 14**.

## **VI      NEXT MEETING DATE AND LOCATION**

The next Subcommittee meeting was set for April 12<sup>th</sup> in Helena.

## **VII     ADJOURNMENT**

There being no further business, the meeting was adjourned.

---

SEN. COLE, Chairman